IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE

E1999-02474-COA-R3-CV
NO. 03A01-9908-CV-00269

PATRICIA J. THOMPSON,

Plaintiff/Appellee,

v.

JOHNNY W. HULSE, J.E. LIGHT, DAVID CHEEK, and THE BOARD OF TRUSTEES OF THE HORSE CREEK FREEWILL BAPTIST CHURCH,

Defendants/Appellants.

Appeal As Of Right From
SULLIVAN COUNTY CIRCUIT COURT

HON. JOHN S. McLELLAN, III

For the Appellant:
Thomas R. Bandy, III
Kingsport

For the Appellee:
Frank B. Dodson
Kingsport

REVERSED AND DISMISSED

Swiney, J.

OPINION

This is an appeal from the Trial Court's declaring a prescriptive easement in Sullivan County in favor of the dominant tenement owned by Plaintiff/Appellee Patricia A. Thompson ("Plaintiff") across the lands of Horse Creek Freewill Baptist Church ("Church") as the servient tenement. Defendants/Appellants ("Defendants") are the pastor and trustees of Horse Creek Freewill Baptist Church, and are parties to this litigation in those capacities. The Trial Court found the use of the Church's driveway by Plaintiff to be open and adverse to the Church, and that Plaintiff could

combine her twelve-year ownership with her predecessor's sixteen-year period of ownership to establish the requisite twenty-year period for asserting prescriptive easement. Defendants challenge the Trial Court's award of prescriptive easement on appeal. For the reasons stated herein, the Order of the Trial Court is reversed and the cause of action dismissed.

BACKGROUND

Plaintiff purchased the property next to the church in 1986 from her aunt, who had purchased the property in 1970. Plaintiff resided on the property from 1986 until 1992 or 1993, at which time her daughter, great-niece of Plaintiff's predecessor, moved onto the property. The Church, through the predecessors of Defendants, gained ownership of the property at issue in 1948. Plaintiff and others used a curving driveway that provides access to two perpendicular roads that border the Church property. This driveway bisects the church property and was used by Plaintiff and others to access a paved area next to the house on Plaintiff's property. This use continued from 1970 until April 1998, when Defendants placed posts on the church property that blocked access to the paved area on Plaintiff's property.

The property deeds made exhibits to the proceedings below show that the Board of Trustees of the Horse Creek Free Will Baptist Church purchased lot 30 of Lot Gott Subdivision in Kingsport in 1948. No mention of an easement appears in the deed, nor do any other encumbrances appear on the face of the recorded warranty deed. James and Manelfia Dean purchased lots 28 and 29 of Lot Gott Subdivision, with an existing house, in 1970. There is no mention of any right to any easement appearing in the recorded warranty deed, and no reference to any driveway or parking area. Likewise, there is no mention of any easement or automobile access in the warranty deed recorded when Plaintiff, niece of the then-widowed Manelfia Dean, purchased Lot Gott lots 28 and 29 from her aunt in 1986.

It was established through testimony and exhibits introduced at trial that a driveway runs across the Church's property from Horse Creek Road on the northeast side of lot 30 to Princeton

Road on the southwest side of the lot. A fence runs between lots 29 and 30 from the back of a garage on lot 29 facing Princeton Road to the terminus of the property line of lot 29. This fence has a gate adjacent to the northeast side of Plaintiff's house and abutting the gravel driveway that crosses the Church's property. This fence and gate have been in place since 1970. A paved area lies between the gate and the house on lot 29, and this pavement continues onto the Church's property for six to eight feet. Plaintiff and others have used the driveway on the Church's property to access the paved area next to the house on lot 29 for parking and other uses.

Testimony established that the use of the Church's driveway by occupants of Plaintiff's property continued from 1970 until one or more Defendants dug post holes and erected three posts at the boundary gate to block access to the paved area in April 1998. Although the recorded deed indicates Plaintiff has retained ownership of lots 28 and 29, it was established that Plaintiff's daughter has been the principal occupant of the property since 1992 or 1993.

After the initial cause of action was transferred from General Sessions to Circuit Court, Plaintiff filed the present complaint to establish prescriptive easement over a strip of the Church's property from the gate abutting the Church's property to Horse Creek Road. At trial, Plaintiff produced testimony of five witnesses to the effect that since 1970 the Church's driveway had been used to access the asphalt area next to Plaintiff's house for parking and other uses, that no permission to use the driveway had been requested from or granted by anyone connected with the Church, that the relations between the Plaintiff and the Church had been friendly, and that it would be inconvenient to construct a driveway on Plaintiff's property from Princeton Road to access the existing paved area because of sewage lines and an underground grease trap. Over objection of Defendants, the Trial Court properly allowed the deposition testimony of Defendant J.E. Light to be read into the record even though Defendant Light was present to testify.

At the close of Plaintiff's proof, Defendants moved for dismissal for failure to prove adverse use by the Plaintiff. The basis for this motion was that the mere use of the driveway was

insufficient to prove the hostile element of adverse possession. After the Trial Court took the motion under advisement, Defendants called to the stand a land surveyor whose testimony and related exhibits established that the driveway lies entirely on the Church's property, that the posts erected by Defendants are on the Church's property, and that the fence between lots 29 and 30 approximates the boundary between the properties.

The Trial Court took the matters presented at trial under consideration, and issued a four-page Order and Judgment filed eight days later granting a prescriptive easement "as described in the complaint," based upon findings of fact that Plaintiff and her predecessor in title had used the driveway for ingress and egress since the Deans purchased the property in 1970, that the use had existed for some period of time prior to purchase by the Deans based upon the presence of the gate and the paved area next to the house, that it would be difficult to build a driveway on Plaintiff's property from Princeton Road to the existing paved area, that Defendants had actual knowledge of the use of the Church's driveway for twenty-eight years, that Defendants never raised any issue regarding such use of the Church's property until the Church erected the posts in 1998, and that Defendants were under the erroneous understanding that Plaintiff's property was unoccupied when the posts were erected to block access to the paved area. The Trial Court further found "that plaintiff and her predecessor's use was continuous, uninterrupted, open, visible, and with the knowledge and acquiescence of the defendants . . .," and that such use was adverse to Defendants under a presumption that the use constituted a claim of right by Plaintiff. The Trial Court supported the declaration of hostile possession with the finding that the asphalt from Plaintiff's paved area extends across the boundary line onto the church property, and, coupled with the presence of the gate, was sufficient to place Defendants on notice of Plaintiff's, and her predecessors', hostile claim since 1970. The Trial Court further rejected Defendants' proposition that failure to object to the use made it permissive rather than hostile, because otherwise such a claim of permission through failure to object could always be used to defeat a claim in adverse possession. The Judgment and Order

concludes with the declaration of the prescriptive easement, and injunctions for Defendants to remove the obstructions placed by Defendants, to refrain from obstructing Plaintiff's access in the future, and to repair the asphalt damage caused by the obstructions erected by Defendants. It is from this Judgment and Order that Defendants appeal.

DISCUSSION

Our standard of review of this non-jury case is *de novo* upon the record below, with a presumption of correctness as to the findings of fact by the Trial Court balanced against the preponderance of the evidence. T.R.A.P. 13(d). There is, however, no such presumption of correctness afforded the Trial Court's conclusions of law. *Quarles v. Shoemaker,* 978 S.W.2d 551, 552 (Tenn. Ct. App. 1998). Although Defendants fail to state with particularity the issue on appeal, they do submit by summary the position that Plaintiff is not entitled to prescriptive easement over the Church's property, the judgment of the Trial Court should be overturned, and Plaintiff's cause of action should be dismissed.

The Trial Court was correct in rejecting Defendants' contention that the failure to establish open hostility between the parties prevents establishment of prescriptive easement. It is not essential to establish adverse use that the claimant show actual hostility between him and the owner of the servient estate. As stated in one of our earlier cases the owner of the servient estate might defeat the claimant's right of prescription by testifying that he never objected to the claimant using the road regardless of for how long a period. *German v. Graham,* 497 S.W.2d 245, 248 (Tenn. Ct. App. 1972). However, the easement claimant still bears the burden of proving adverse possession by clear and positive proof. *McCammon v. Meredith,* 830 S.W.2d 577, 580 (Tenn. Ct. App. 1991).

The Trial Court was correct in finding that the asphalt extending across the property boundary from Plaintiff's paved area for six to eight feet on the Church' property constituted adverse use sufficient to establish notice of claim of right. "[P]lacing a pavement over the land claimed and

using it as a means of access to other property of claimant was sufficient to put the owner on notice that a hostile claim was being asserted to his land . . .." *Lamons v. Mathes*, 232 S.W.2d 558, 563 (Tenn. Ct. App. 1950). "[T]he construction of a garage and the grading and using of a well defined driveway are at least as effective in giving notice to the true owner of an adverse use of his property as the construction of a fence. . . . The open and apparent use of the property inconsistent with possession by the true owner was notice to the world that the claim was adverse." *Peoples v. Hagaman*, 215 S.W.2d 827, 829-830 (Tenn. Ct. App. 1948).

Defendants are correct, however, that the Trial Court erred in finding that this use meets the twenty year requisite for prescriptive easement. "Twenty years of adverse use is required to establish a prescriptive easement." *Town of Benton v. Peoples Bank of Polk County*, 904 S.W.2d 598, 602 (Tenn. Ct. App. 1995), quoting *McCammon*, 830 S.W.2d at 581. The procedure by which successive possessions are allowed to be combined to establish adverse possession is called tacking. Tacking requires that the combined periods be successive, that each possession must meet the elements of prescriptive easement, and that the possessions be in privity.

> Even if it had been established, however, that the user by complainants' predecessor in title, as well as that of complainants, was adverse, it still would avail complainants nothing. The law is settled in Tennessee that in the absence of privity between successive possessors, and in the absence of evidence of contractual intention to connect their respective possessions, successive possessions, even though adverse, cannot be tacked together to create a bar of the . . .[requisite] statute of limitations.
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> *Pyron v. Colbert*, 328 S.W.2d 825, 830 (Tenn. Ct. App. 1959).

The contractual intention to connect successive adverse possessions through tacking requires the property claimed through the judicial mechanism to establish prescriptive easement be described in the deed transferring ownership between the adverse possessors, or be established through parol evidence sufficient to establish the buyer's right of reasonable reliance on representations made by the buyer's predecessor relating to the transfer of ownership.

> The general rule that successive adverse possessions cannot be tacked unless the possessors are connected by some form of legal privity was applied in *Erck v.*

> *Church*, supra, and *Ferguson v. Prince*, 136 Tenn. 543, 190 S.W. 548. However, the rule is subject [to] exceptions. In *Rembert v. Edmondson*, 99 Tenn. 15, 41 S.W. 935, 63 Am.St.Rep. 819, a parol understanding that a strip on the rear of a lot conveyed by deed would go with the lot to the extent the grantor had any title to convey was held to supply the necessary privity although the strip adjoining the lot conveyed was not within the calls of the deed. See also *Tuggle v. Southern Railway Co.*, 140 Tenn. 275, 204 S.W. 857; *Mercy v. Miller*, 25 Tenn.App. 621, 166 S.W.2d 628.
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> A deed does not of itself create privity between the grantor and the grantee as to land not described in the deed but occupied by the grantor in connection therewith, although the grantee enters into possession of land not described and uses it in connection with that conveyed. *Erck v. Church*, 87 Tenn. 575, 11 S.W. 794, L.R.A. 641; *Ferguson v. Prince*, 136 Tenn. 543, 190 S.W. 548. However:
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> 'This rule is very sharply limited; and while broader language may be found in some cases, it is apparently applicable to those cases *only wherein the deed itself is relied on solely to create privity*, and there is no circumstance showing an intent to transfer the possession of any property beyond the calls of the deed.' 1 Am.Jur., 883, Adverse Possession, Section 156.
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> *Peoples v. Hagaman*, 215 S.W.2d 827, 830 (Tenn. Ct. App. 1948) (emphasis added).

The deed to the Plaintiff from her Grantor does not create the required privity between Plaintiff and her Grantor, her aunt, as to the claimed easement. The deed creates privity between the Plaintiff and her Grantor solely as to the land covered by the deed. The deed makes no mention of any easement or right to use the Church's property or to a right of way over the Church's property. Additionally, there was no evidence in the record before us concerning a parol understanding or representation by the Plaintiff's Grantor to Plaintiff that she was being conveyed a right of way over the Church's land. This "privity" which would allow tacking by the Plaintiff and her Grantor is absent.

Familial relation is another form of privity recognized by the courts to establish the right to tack periods of adverse use. *Peoples*, 215 S.W.2d at 831 (quoting C.J.S., Adverse Possession §130); see *Hill v. Hill*, 403 S.W.2d 769, 781-782 (Tenn. Ct. App. 1965). However, none of the cases examined by this Court has extended the right of privity by family relation beyond property transfers involving the spousal or parent-child relationship.

> Where a parent and child occupy land successively for the full statutory period in a manner consistent with all the elements necessary to acquire title by adverse possession, their possessions may be joined together to give title to the last occupant by adverse possession, provided there is no break in continuity.
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> 2 C.J.S., Adverse Possession, § 159 (former § 130).

Even though Plaintiff testified that she visited with her aunt on the property at issue prior to her ownership and "practically" lived there, we find no basis in the trial record to justify extending the concept of privity in the conveyance of property, as it relates to prescriptive easement, to degrees of kinship beyond the established relationship of spouse or parent and child.

The trial record establishes that prescriptive easement is the only claim of right Plaintiff can assert to legally access the church driveway.

> An easement is a right an owner has to some lawful use of the real property of another. [ ] Easements can be created in several ways in Tennessee, including: (1) express grant, (2) reservation, (3) implication, (4) prescription, (5) estoppel, and (6) eminent domain. Easements can be divided into two broad classes, easements appurtenant, and easements in gross. In an easement appurtenant, there are 2 tracts of land, the dominant tenement, and the servient tenement. The dominant tenement benefits in some way from the use of the servient tenement. Easements in gross are simply a personal interest or right to use the land of another which does not benefit another property, or dominant estate, thus easements in gross usually involve only one parcel. An easement appurtenant to land is favored over an easement in gross in Tennessee.
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> *Pevear v. Hunt*, 924 S.W.2d 114, 115-116 (Tenn. Ct. App. 1996).

The trial record reveals no express grant of easement to Plaintiff, nor reservation of easement in any deed. As there are two tracts of land involved in the present case, with the benefit claimed relating to the property rather than to the personal interest of an individual, this is a claim to an easement appurtenant rather than an easement in gross. The findings of the Trial Court relating to difficulty in building a driveway from Plaintiff's Princeton Road frontage to the paved area next to the house are irrelevant to the issue of prescriptive easement, and fail to meet the requirements of any other easement right set forth in *Pevear*. Additionally, there is no right in Plaintiff to an easement by necessity. "On a conveyance that leaves the land conveyed or retained surrounded by the land of the

grantor or grantee and third persons, a way of necessity is implied in favor of the landlocked parcel." *Morris v. Simmons*, 909 S.W.2d 441, 444 (Tenn. Ct. App. 1993). Testimony and exhibits introduced at trial show that Plaintiff's property is not landlocked, having frontage on both Princeton Road and Pennsylvania Avenue, and a garage on the property with direct access to Princeton Road.

Because Plaintiff has failed to establish the twenty-year period of adverse use necessary to create a prescriptive easement across Defendants' property, and because other claims of right to use the Church's driveway to reach the paved area on her property fail for the reasons discussed in this opinion, the Judgment of the Trial Court is reversed, and Plaintiff's suit is dismissed.

CONCLUSION

The judgment of the Trial Court is reversed, and Plaintiff's suit is dismissed. The costs on appeal are assessed against the Appellee, Patricia J. Thompson.

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D. MICHAEL SWINEY, J.

CONCUR:

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HOUSTON M. GODDARD, P.J.

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CHARLES D. SUSANO, JR., J.